

# A DOMESTIC PROPOSAL TO REVIVE THE HAGUE JUDGMENTS CONVENTION: HOW TO STOP WORRYING ABOUT STREAMS, TRICKLES, ASYMMETRY, AND A LACK OF RECIPROCITY

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## INTRODUCTION

Personal jurisdiction is, at best, a confusing and unpredictable doctrine. Even unsuccessful challenges to personal jurisdiction consume inordinate amounts of pretrial resources, and successful challenges may leave American consumers without a remedy when harmed by foreign manufacturers.<sup>1</sup> These difficulties are most pronounced in product liability

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1. See Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 108–09 (2012) (“Disputes over personal jurisdiction occur more than a thousand times each year, twice as frequently as they did only two decades ago. These disputes decrease the chance that plaintiffs will be able to litigate in a convenient forum, and undoubtedly affect plaintiffs’ cost-benefit analysis as they consider whether to proceed with their lawsuits.”); Andrew F. Popper, *Unavailable and Unaccountable: A Free Ride for Foreign Manufacturers of Defective Consumer Goods*, 36 BUREAU NAT’L AFF. PRODUCT SAFETY & LIABILITY REP. 219, 225 (May 3, 2008) (“[E]ven when a foreign manufacturer’s products foreseeably enter the stream of commerce in the United States, generate a profit for the manufacturer, and proximately cause harm, the manufacturer stands a very good chance of avoiding responsibility when

actions against foreign manufacturers. The United States Supreme Court's recent personal jurisdiction decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, presents another missed opportunity to bring clarity and coherence to specific personal jurisdiction, particularly in the context of international manufacturers of products.<sup>2</sup> Although the Court's recent general personal jurisdiction cases, *Daimler AG v. Bauman* and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, provided some much-needed guidance on general personal jurisdiction over business entities,<sup>3</sup> *Nicastro* continued the unfortunate pattern of a Court fractured over the animating rationale for, and the scope of, specific personal jurisdiction, particularly as it applies in product liability actions against foreign manufacturers.<sup>4</sup> Claimants are not the only ones harmed as a result of this continued incoherence. American manufacturers are also at a competitive disadvantage to foreign manufacturers because American manufacturers are fully subject to American product liability law, while foreign manufacturers can discount the cost of complying with American product liability law because personal jurisdiction reduces the risk of being hailed before an American court. *Nicastro* further encourages foreign manufacturers to avoid our liability system altogether by using intermediaries to distribute their products, thus avoiding "minimum contacts" with any state.<sup>5</sup>

Similarly, American money judgments are subject to a certain level of international discrimination, despite more than fair treatment of foreign money judgments in American courts. In the seminal case of *Hilton v. Guyot*, the Supreme Court required reciprocity, that is, whether the foreign court would enforce a similar American judgment, before enforcing a foreign judgment.<sup>6</sup> Most states, however, have discarded the *Hilton* Court's reciprocity requirement when enacting laws governing judgment recognition and enforcement.<sup>7</sup> While judgments obtained abroad are

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those products injure or kill U.S. consumers.").

2. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (containing three separate opinions, none of which garnered support from a majority of the Court, and which could not agree on the approach lower courts should take in stream of commerce cases).

3. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2013) (simplifying general jurisdiction to the "essentially at home" standard); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (same).

4. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112, 117 (1987).

5. *Nicastro*, 131 S. Ct. at 2790.

6. *Hilton v. Guyot*, 159 U.S. 113, 227–28 (1895).

7. See Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments*, FED. JUD. CENTER INT'L LITIG. GUIDE, 11 (April 2012), [http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/\\$file/brandenforce.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf) [hereinafter Brand, *Recognition and Enforcement*] ("Specifically, Florida, Idaho, Maine, North Carolina, Ohio, and Texas make reciprocity a discretionary ground for recognition, while

generally enforceable in United States courts, domestic judgments remain more difficult to enforce abroad. Four reasons are commonly given for this disparate treatment of American judgments: (1) exorbitant bases of personal jurisdiction (for example, long arm “doing business” jurisdiction, or physical presence, also known as “tag” jurisdiction), (2) “excessive” jury awards, (3) the public policy of the forum, and (4) punitive damages.<sup>8</sup> This asymmetrical enforcement similarly disadvantages Americans.

These transnational problems are ripe for an international solution. Over the last two decades, the United States and its fellow Hague Convention member states have negotiated a proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Judgments Convention), which would have not only made enforcement of domestic judgments in foreign courts more likely, but would have also included a basis for establishing personal jurisdiction over foreign product manufacturers.<sup>9</sup> The Hague Judgments Convention, however, seems unlikely ever to become law and, even if it did, it would suffer from constitutional infirmities. Our fellow Hague member states have a strong disincentive to come to an agreement on the Hague Judgments Convention because they benefit from the asymmetrical burdens and advantages that the American rules of personal jurisdiction and judgment enforcement currently create.

Congress should adopt legislation that will, as far as possible, create incentives for our fellow Hague Convention partners to adopt the Hague Judgments Convention, with some modifications. Congress recently considered the Foreign Manufacturers Liability Accountability Act (FMLAA), an admirable yet flawed resolution to the imbalance in personal

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Georgia and Massachusetts make it a mandatory ground.”); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d (noting that the reciprocity requirement in *Hilton* is no longer followed in a majority of state and federal courts in the United States).

8. *See* Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 378, 381–86, 409–10 (2001), available at <http://www2.nycbar.org/Publications/record/> [hereinafter *Survey on Foreign Recognition*]; SAMUEL BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS, TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION 184–85 (2003); Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from A U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 759 (2004).

9. *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, art. 10(1), adopted on Oct. 30, 1999, available at <http://www.hcch.net/upload/wop/jdgmpl11.pdf> [hereinafter Preliminary Draft Convention] (establishing the occurrence of an injury in the forum as a permissible basis for the exercise of personal jurisdiction: “A plaintiff may bring an action in tort or delict in the courts of the State . . . in which the injury arose . . .”); *see also* BAUMGARTNER, *supra* note 8, at 3–4 (describing this jurisdictional basis in the Hague Judgments Convention).

jurisdiction.<sup>10</sup> The FMLAA would have required foreign manufacturers to designate an agent for service of process in one state as a condition of that manufacturer's product being distributed or sold in the United States.<sup>11</sup> The FMLAA also equated the act of designating an agent with consenting to personal jurisdiction in the courts of that state.<sup>12</sup> Fortunately, the FMLAA did not pass because it suffers from a number of flaws, the most significant of which is the way it reinforces a race to the bottom.<sup>13</sup> Manufacturers that must designate an agent in only one state will rationally choose the state with the most manufacturer-friendly tort laws or juries, or perhaps the most geographically inconvenient state for consumers such as Alaska or Hawaii. A simple change in language can rectify these shortcomings. Congress should revise the FMLAA to require foreign manufacturers to consent to jurisdiction in any court that is an otherwise proper venue, for example, where the accident or injury occurred. Congress has the authority to accomplish this because the FMLAA is a constitutional exercise of Congress' authority under the Foreign Commerce Clause.<sup>14</sup> The FMLAA may also be justified in terms of the federal government's authority over foreign relations.<sup>15</sup>

Congress should also adopt the American Law Institute's (ALI) proposed Federal Judgment Recognition and Enforcement Act (FJREA),

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10. See Foreign Manufacturers Legal Accountability Act, S. 1946, 112th Cong. (2011) [hereinafter FMLAA].

11. *Id.* § 5.

12. *Id.* § 5(c)(1).

13. See *id.* §§ 5(a)(2), (c)(1) (requiring that the agent be designated in a single state of the manufacturer's choosing, limited only to the fact that the state have a "substantial connection" to the product and equating that designation to consent to personal jurisdiction in that state).

14. See U.S. CONST. art. I, § 8, cl. 3; Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 257 (1991) [hereinafter Brand, *Enforcement of Foreign Judgments*].

15. See Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 582 n.133 (2002) ("Although Congress possesses enumerated powers that would support [the ALI's draft FJREA] in some of its applications, such as the foreign commerce power, the implied power over foreign affairs might be necessary to sustain application of the legislation to all cases.") (citation omitted); see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1634–35 (1997) ("Such suits typically implicate issues that fall in the gray zone between substance and procedure: transnational choice of law, transnational *forum non conveniens*, the enforcement of transnational forum selection clauses, and the recognition of foreign judgments. These issues are not governed by enacted federal law. The question thus arises whether they are governed by state law or federal common law. The Supreme Court has not resolved this question. But some lower courts have ruled that these issues implicate federal foreign relations interests and should be governed by the federal common law of foreign relations. Commentators overwhelmingly agree with this conclusion."); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 16–22, 70–72 (2d ed. 1996) (discussing the unenumerated foreign affairs power of Congress).

which reincorporates a version of the *Hilton* Court's reciprocity requirement.<sup>16</sup> Under the FJREA, if the party opposing the foreign judgment can raise substantial doubt that a foreign court would enforce a similar judgment rendered in this country, our courts shall not enforce the foreign judgment.<sup>17</sup> These two alterations of the status quo can help create incentives for foreign countries to return to the negotiating table. In the interim, and to the extent that these incentives are insufficient to fully accomplish the goals of reducing these asymmetries, the proposed legislation will resolve much of the unfairness to American businesses and consumers.

The Hague Judgments Convention as currently conceived, however, is not without flaws. To achieve parity in personal jurisdiction, the precise wording of the treaty must be changed. Even if the Convention had been ratified as currently drafted, its basis for personal jurisdiction in many product claims—establishing personal jurisdiction in any court having jurisdiction over the place where the harmful event occurred—was likely unconstitutional. Treaties remain subordinate to the United States Constitution, and any treaty provision inconsistent with the Due Process Clause of the Constitution will most likely fail Supreme Court scrutiny.<sup>18</sup> Because the mere occurrence of a harmful event in the jurisdiction is not a sufficient “minimum contact” to confer personal jurisdiction under the Due Process Clause,<sup>19</sup> the Hague Judgments Convention would likely conflict with the Constitution in the very circumstances it was intended to reconcile. As a result, the Convention should be revised before it can be adopted.

To achieve consistency with the Due Process Clause, the Hague Judgments Convention should utilize the concept of consent as the basis for personal jurisdiction, much as the FMLAA proposed. Under the Due Process Clause, personal jurisdiction is a personal right, which may be waived. Consent is, and always has been, a valid exception to an otherwise insurmountable personal jurisdiction objection. The United States and our Hague Convention partners have, as sovereign powers, the authority to

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16. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE § 7, at 92 (2006).

17. *Id.*

18. *Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (holding that treaties must comply with the Constitution).

19. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–97 (1980) (collecting cases and explaining how the occurrence of an injury in a location is not sufficient to establish personal jurisdiction); *see also, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (“[F]oreseeability of causing injury in another State . . . is not a sufficient benchmark for exercising personal jurisdiction.”) (internal quotations omitted).

require their respective constituents to consent to jurisdiction as part of a treaty. As a result, the Hague Judgments Convention can be reworded to address the asymmetries of personal jurisdiction and judgment enforcement without running afoul of the Constitution.

# I. THE SUPREME COURT’S INCOHERENT STREAM OF COMMERCE DOCTRINE OF PERSONAL JURISDICTION INADVERTENTLY PROTECTS FOREIGN MANUFACTURERS AT THE EXPENSE OF AMERICAN CONSUMERS AND BUSINESSES

- A. American courts may exercise personal jurisdiction over a nonresident only when the nonresident has sufficient “minimum contacts” with the forum state.

In the United States, personal jurisdiction is a constitutional limit on a court’s power to adjudicate the rights and responsibilities of a defendant in a civil action.<sup>20</sup> Before a court may acquire jurisdiction over the defendant’s person, due process requires that a nonresident defendant “have certain minimum contacts” with the forum state “such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>21</sup> In analyzing “minimum contacts,” a court focuses on the relationship between each particular defendant’s *actions* and the forum state.<sup>22</sup> Indeed, “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . . [It] is essential in each case that there be

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20. See *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990); *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878); see also FED. R. CIV. P. 12(b)(2) (stating that as a practical matter, personal jurisdiction is a defense to an action that must be raised pre-answer or waived). Whether this limitation is premised on notions of sovereignty or territorial limits of the state on the one hand, or the personal liberty interests of defendant on the other is debatable. Compare *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (“[Due process] restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.”), with *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (explaining that the Due Process Clause “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”), and *Walden v. Fiore*, No. 12–574, slip op. at 5, (U.S. Feb. 25, 2014) (“The Due Process Clause of the Fourteenth Amendment constrains a State’s authority to bind a nonresident defendant to a judgment of its courts.”).

21. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

22. *Id.* at 319 (“Whether due process is satisfied must depend rather upon the *quality and nature of the activity* in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.”) (emphasis added); see also *Walden*, No. 12–574 at 7–8 (explaining that the relevant analysis focuses not only on the defendant’s contacts, but also the defendant’s contacts with the State, as opposed to persons in the State).

some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State . . . .”<sup>23</sup> This focus on the particular defendant’s “purposeful availment” discounts or even ignores the actions of third parties, including parties in contractual privity with the defendant such as distributors, or parties closely related to the defendant such as wholly-owned subsidiaries.<sup>24</sup> As a result, the fact that a manufacturer hopes, desires, or even expects the stream of commerce to carry its product to the forum state—when the product not only ends up in the State, but injures someone there—is generally insufficient to establish jurisdiction over the defendant.

- B. The Supreme Court’s stream of commerce decisions make establishing jurisdiction over nonresident product manufacturer defendants difficult or even impossible.

Over the last three decades, the stream of commerce metaphor has failed to bring “a degree of predictability to the legal system” that the Due Process Clause was designed to foster.<sup>25</sup> In 1980, the concept debuted in *World-Wide Volkswagen v. Woodson*.<sup>26</sup> In *World-Wide Volkswagen*, a New York resident bought a brand new Audi from Seaway Volkswagen in New York. While driving the Audi on a family trip through Oklahoma, the Woodsons were rear-ended and a fire broke out, seriously burning Mrs. Woodson and her children. The family sued the German manufacturer, Audi; the American importer, Volkswagen of America; the regional distributor, World-Wide Volkswagen; and the retailer, Seaway Volkswagen, all in Oklahoma state court. The regional distributor and retailer objected to personal jurisdiction and the Supreme Court agreed that neither was subject to the jurisdiction of the Oklahoma courts.

The Supreme Court analyzed World-Wide Volkswagen and Seaway Volkswagen’s actions in relation to Oklahoma and concluded that neither

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23. *Hanson*, 357 U.S. at 253 (emphasis added); see *Burger King*, 471 U.S. at 475 (“Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum State.”) (emphasis in original) (internal quotation marks omitted).

24. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, n.13 (1984) (requiring that forum contacts of parent corporation and of wholly-owned subsidiary be assessed individually); see also *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (assuming that a distributor’s contacts may be imputable to the parent corporation defendant for purposes of establishing general jurisdiction, but finding insufficient contacts in any event).

25. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

26. See *id.* at 297–98 (“The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”).



had minimum contacts with the State. Both were New York corporations, and neither conducted any business in Oklahoma, including advertising, selling, or shipping products to Oklahoma or its residents.<sup>27</sup> The only connection to Oklahoma arose from the actions of the consumer driving the vehicle there.<sup>28</sup> The Court left open, however, the prospect that personal jurisdiction would be permissible where the defendant's actions attempt to serve the market in a state "directly or indirectly,"<sup>29</sup> stating: "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>30</sup>

This dicta from *World-Wide Volkswagen* suggests that even *indirect* efforts to serve the forum state and the *expectation* that the stream of commerce will carry the product to the state's consumers, could justify an assertion of personal jurisdiction. It seems to leave the door open for the stream of commerce to carry a defendant into the forum state's courts.

Seven years later, in *Asahi Metal Industry Co. v. Superior Court*, the Court cast considerable doubt on the "stream of commerce" as a viable jurisdictional theory.<sup>31</sup> The unusual factual scenario, however, left open the possibility that the stream of commerce may have increased relevance under different circumstances. *Asahi* began as a product liability action brought in California state court by a motorcycle rider against the manufacturer of one of the motorcycle's tire tubes, Cheng Shin, a Taiwanese corporation.<sup>32</sup> Cheng Shin in turn sought indemnification from the tire tube's valve manufacturer, Asahi Metal Industry Co., Ltd., a Japanese corporation.<sup>33</sup> The motorcycle rider settled with all defendants, leaving only the cross-claim between Cheng Shin and Asahi.<sup>34</sup> The Court unanimously agreed that a California state court's exercise of jurisdiction over a dispute between a Japanese valve manufacturer and a Taiwanese tire tube manufacturer—neither of whom solicited business in or made direct sales to California—would, irrespective of Asahi's contacts with the forum, be "unreasonable and unfair" under the circumstances.<sup>35</sup> The Court was

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27. *Id.* at 287–89, 295.

28. *Id.* at 289.

29. *Id.* at 297 (emphasis added).

30. *Id.* at 297–98.

31. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111 (1987).

32. *Id.* at 106.

33. *Id.*

34. *Id.*

35. *Id.* at 117 (Brennan, J., concurring); *id.* at 121 (Stevens, J., concurring).

unable, however, to fashion a majority opinion agreeing on the precise contours of the minimum contacts test as applied to foreign product manufacturers whose products predictably, and perhaps even intentionally, wind up in the forum state. The fractured nature of the Court's opinions left some hope that different facts would make different law.

The Court was split on the central question of whether the manufacturer's admitted awareness that its products would be purchased by consumers in the forum state, coupled with the fact that the stream of commerce indeed carried the product into the forum state, would justify an assertion of personal jurisdiction.<sup>36</sup> Justice O'Connor, writing for a four-Justice bloc, explained that mere awareness is not tantamount to purposeful availment; hence, Asahi's awareness that Cheng Shin sold its products in California was not "*an action of the defendant purposefully directed toward the forum State.*"<sup>37</sup> Justice O'Connor's formulation requires "additional conduct" and has come to be known as the "stream of commerce plus" test:

Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.<sup>38</sup>

Justice O'Connor found the additional conduct purposefully directed at the forum state lacking on these facts.

Justice Brennan, writing for another four-Justice bloc, found purposeful availment not in Asahi's mere awareness of Cheng Shin's conduct, but Asahi's conduct in light of its awareness.<sup>39</sup> Justice Brennan quoted approvingly the above-referenced dicta from *World-Wide Volkswagen* that even *indirect* efforts to serve a market, coupled with the *expectation* that the product will be purchased in the forum state, is sufficient contact with the forum state for due process purposes.<sup>40</sup> Justice Brennan focused on Asahi's repeated and extensive sales to Cheng Shin, all

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36. *Id.* at 112 (majority opinion); *id.* at 117 (Brennan, J., concurring); *id.* at 121–22 (Stevens, J., concurring).

37. *Id.* at 112 (majority opinion) (emphasis in original).

38. *Id.*

39. *Id.* at 117 (Brennan, J., concurring).

40. *Id.* at 119–20.

while knowing that Cheng Shin was selling Asahi's products in the United States, including California. Unlike Justice O'Connor, Justice Brennan saw "no need for such a showing" of "additional conduct"; Asahi's conduct was sufficient to constitute "purposeful availment."<sup>41</sup> For nearly twenty-five years, lower courts struggled with the application of these two tests.<sup>42</sup>

These two competing visions of the stream of commerce converged again in the Court's most recent pronouncement in *Nicastro*.<sup>43</sup> The plaintiff, Nicastro, seriously injured his hand in a metal-shearing machine while working in New Jersey.<sup>44</sup> J. McIntyre manufactured the machine in the United Kingdom, and sold the machine through an independent distributor throughout the United States.<sup>45</sup> This particular machine was the only one sold in New Jersey.<sup>46</sup> The New Jersey Supreme Court upheld personal jurisdiction over the U.K. company and the Supreme Court reversed.<sup>47</sup> Once again, the Court was unable to fashion a majority opinion describing the limits of personal jurisdiction in stream of commerce cases.

Four members of the Court essentially endorsed Justice O'Connor's "stream of commerce plus" test, requiring additional conduct by the defendant that is purposefully directed at the forum state.<sup>48</sup> Justice Kennedy, writing for the plurality, focused specifically on J. McIntyre's conduct, whether phrased as "purposeful availment," "activity directed at the sovereign," or "a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign."<sup>49</sup> The plurality stressed that "*an independent company* agreed to sell J. McIntyre's machines in the United States" and "J. McIntyre *itself* did not sell its machines to buyers in this country beyond the U.S. distributor . . . ."<sup>50</sup> Though Justice Kennedy acknowledged that selling through a distributor who serves the entire United States may demonstrate an intent to serve the U.S. as a whole, he emphasized that J. McIntyre did not advertise or market in, send or ship to, or otherwise target New Jersey.<sup>51</sup>

The two concurring Justices declined (at least facially) to decide

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41. *Id.* at 117.

42. Alison G. Myhra, *Civil Procedure*, 39 TEX. TECH L. REV. 689, 705-06 n.120 (2007) (collecting cases applying the two competing tests).

43. 131 S. Ct. 2780 (2011).

44. *Id.* at 2786.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 2790.

49. *Id.* at 2787-89.

50. *Id.* at 2786 (emphasis added).

51. *Id.* at 2785-86.

between the two competing tests.<sup>52</sup> Instead, they focused on the fact that there was no “stream of commerce” to begin with; the “stream” was nary a trickle.<sup>53</sup> Indeed, the record reflected that only a single machine was sold in New Jersey.<sup>54</sup> The concurring Justices were persuaded that, whether foreseeability or additional conduct is required, a single sale in the forum state is not even a “stream” of commerce that can justify New Jersey’s exercise of personal jurisdiction over the foreign manufacturer.<sup>55</sup>

The dissent recognized the implications of the common ground between the plurality and concurring opinions: a foreign manufacturer that not only foresaw, but intended that its products would end up in the United States, can “Pilate-like wash its hands of a product by having independent distributors market it.”<sup>56</sup> At least six members of the Court acknowledged that the U.K. manufacturer specifically intended that its products end up in the United States.<sup>57</sup> Essentially, the distributor, by making the actual sale, insulated J. McIntyre from the jurisdiction of the New Jersey court.<sup>58</sup> Although all nine members of the Court apparently believed J. McIntyre “purposefully availed” itself of the United States market, no state apparently would be able to exercise jurisdiction over J. McIntyre.<sup>59</sup>

- C. The “stream of commerce” doctrine encourages foreign manufacturers to avoid establishing “minimum contacts” with any American state by using distributors or other intermediaries.

Foreign product manufacturers that sell their products in the United States through distributors, subsidiaries, or affiliates can take advantage of the Supreme Court’s stream of commerce doctrine to reduce the risk that a court will find minimum contacts with the forum state.<sup>60</sup> While the dissenters in *Nicastro* bemoan the specter of foreign manufacturers using intermediaries to avoid American personal jurisdiction, in truth the fractured nature of *Asahi* encouraged this result nearly twenty-five years earlier. Justice O’Connor’s more restrictive stream of commerce plus test

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52. *Id.* at 2791 (Breyer, J., concurring).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 2795 (Ginsburg, J., dissenting) (internal quotations omitted).

57. *Id.* at 2790–91 (plurality opinion).

58. *Id.* at 2795 (Ginsburg, J., dissenting).

59. *Id.* at 279–91, 2794 (plurality opinion).

60. See Taylor Simpson-Wood, *In the Aftermath of Goodyear Dunlop: Oyez! Oyez! Oyez! A Call for A Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 131 (2012) (“The U.S. distributor serves as a ‘middleman,’ thereby permitting a foreign manufacturer to claim ignorance of the ultimate destinations for its products.”).

appeared to embrace assertions of jurisdiction over product manufacturers that “market[] the product through a distributor who has agreed to serve as the sales agent in the forum State.” While this dictum may seem to permit jurisdiction over manufacturers that make use of distributors, the key to the phrase appears to be the agency relationship. Most foreign manufacturers, however, are careful to avoid entering into distribution arrangements in which the distributor becomes the agent of the manufacturer.<sup>61</sup>

Though lower courts have been far from uniform in their interpretation and application of *Asahi*, the majority of courts around the country have followed Justice O’Connor’s formulation, creating difficult procedural hurdles for plaintiffs injured in this country by a foreign manufacturer’s products.<sup>62</sup> Courts applying the stream of commerce plus test have often found personal jurisdiction over foreign manufacturers lacking.<sup>63</sup> Justice O’Connor’s opinion explicitly encourages this—she cited *Hutson v. Fehr Brothers, Inc.*, a case in which the Eighth Circuit held that layers of independent distributors could shield a foreign manufacturer from jurisdiction.<sup>64</sup> In many of the cases that follow Justice O’Connor’s stream of commerce plus test, foreign manufacturers were able to effectively insulate themselves from American law by using an intermediary to access the American market, such as a distributor, retailer, or even a wholly-owned subsidiary.<sup>65</sup> And, as Justice Ginsburg acknowledged, *Nicastro*

61. See Brief of the Prod. Liab. Advisory Council, Inc. as Amici Curiae Supporting Petitioner, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 13432010 WL 4717267 at \*18 (Nov. 19, 2010) (citing 1 W.M. GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE § 3:6, at 90 (2010) (“The dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose.”)).

62. Popper, *supra* note 1, at 223 (“While a number of courts have elected to follow Justice Brennan’s concurrence in *Asahi*, the majority follow Justice O’Connor’s plurality opinion, resulting in a far more difficult jurisdictional challenge for injured plaintiffs.”).

63. *Id.* at 225 (“[E]ven when a foreign manufacturer’s products foreseeably enter the stream of commerce in the United States, generate a profit for the manufacturer, and proximately cause harm, the manufacturer stands a very good chance of avoiding responsibility when those products injure or kill U.S. consumers.”).

64. See *Hutson v. Fehr Bros.*, 584 F.2d 833, 837 (8th Cir.), *cert. denied*, 439 U.S. 983 (1978).

65. See, e.g., *Kozial v. Bombardier-Rotax GmbH*, 129 F. App’x 543, 547 (11th Cir. 2005) (independent distributor); *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550–51 (7th Cir. 2004) (independent distributor); *Zombeck v. Amada Co.*, CIV. A. 06-953, 2007 WL 4105231, at \*6 (W.D. Pa. Nov. 15, 2007) (wholly-owned subsidiary); *Cupp v. Alberto-Culver USA, Inc.*, 308 F. Supp. 2d 873, 878–79 (W.D. Tenn. 2004) (wholly-owned subsidiary); *Affatato v. Hazer-Werk*, CIV.A. 01-CV-4345, 2003 WL 22797786, at \*2 (E.D. Pa. Nov. 19, 2003) (independent distributor); *Savage v. Scripto-Tokai Corp.*, 147 F. Supp. 2d 86, 92–94 (D. Conn. 2001) (wholly-owned subsidiary); *Envirotech Pumpsystems, Inc. v. Sterling Fluid Sys.*, 2:99CV814K, 2000 WL 35459756, at \*4–5 (D. Utah Nov. 16, 2000) (independent distributor); *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W. 2d 565, 572 (Minn. 2004) (independent distributor); *Vargas v. Hong Jin Crown Corp.*, 636 N.W.2d 291, 301–02 (Mich. App. 2001) (independent distributor); *Bedrejo v. Triple E Canada, Ltd.*, 984 P.2d 739, 742

exacerbates this problem; many lower courts continue to hold that foreign manufacturers are insulated from American assertions of personal jurisdiction.<sup>66</sup>

This result seems intentional. The Supreme Court has always recognized that parties can structure their conduct to avoid personal jurisdiction in the United States.<sup>67</sup> The Court has explicitly stated that the Due Process Clause is intended to “ensur[e] the ‘orderly administration of the laws,’” and give “a degree of predictability to the legal system that allows potential defendants to *structure their primary conduct* with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>68</sup>

- D. The net effect of American personal jurisdiction rules is that foreign manufacturers can significantly discount the cost of complying with American tort law.

Professor Buehler’s recent and thorough economic analysis of the stream of commerce doctrine demonstrates how our jurisdictional rules reduce the deterrent effect of American tort law on foreign product manufacturers.<sup>69</sup> Defendants need not universally prevail on jurisdictional

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(Mont. 1999) (nationwide retailers); *CMMC v. Salinas*, 929 S.W.2d 435, 439–40 (Tex. 1996) (independent distributor); *Hapner v. Solis Apparatus Manufactories, Ltd.*, 411 N.W.2d 439, 447–50 (Mich. 1987) (independent distributor).

66. See, e.g., *Monge v. RG Petro-Mach. (Group) Co.*, 701 F.3d 598, 618 (10th Cir. 2012); *Fed. Ins. Co. v. Steris Corp.*, No. 11-CV-00078 SRN/AJB, 2012 WL 5187790, at \*7-8 (D. Minn. Oct. 19, 2012) (independent distributor); *Sieg v. Sears Roebuck & Co.*, 855 F. Supp. 2d 320, 323, 328 (M.D. Pa. 2012) (independent distributor), *recon. denied*, No. 3:10CV606, 2012 WL 1657921 (M.D. Pa. May 11, 2012); *Eskridge v. Pacific Cycle, Inc.*, 2:11-CV-00615, 2012 WL 1036826 (S.D.W. Va. Mar. 27, 2012) (independent distributor); *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 640, 644 (D. Md. 2011); *Dow Chem. Canada ULC v. Superior Court*, 202 Cal. App. 4th 170, 174 (2011) (independent distributor), *modified* (Dec. 21, 2011), *rev. denied* (Apr. 18, 2012), *cert. denied*, 133 S. Ct. 427 (2012); *Dierig v. Lees Leisure Indus., Ltd.*, 830 F. Supp. 2d 330, 339 (E.D. Ky. 2011), *order vacated on recon.*, CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012); *Graham v. Hamilton*, CIV.A. 11-609, 2012 WL 893751 (W.D. La. Jan. 31, 2012), *report and recommendation rejected*, CIV.A. 3:11-609, 2012 WL 893748 (W.D. La. Mar. 15, 2012); *Moore v. R.G. Brinkmann Co.*, 3:11-CV-208 JPG-PMF, 2012 WL 407203, \*1 (S.D. Ill. Feb. 8, 2012); *Gardner v. SPX Corp.*, 272 P.3d 175, 182 (Utah Ct. App. 2012) (independent distributor); *Brem v. Weinstein Co.*, B227245, 2012 WL 1130207 (Cal. Ct. App. Apr. 2, 2012) (unpublished opinion); *Viator v. HTC Holding*, 04-12-00447-CV, 2012 WL 5984700 \*6–7 (Tex. App. Ct. Nov. 28, 2012); see also Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167, 180 (1989) (“[f]oreign manufacturers . . . are not equally subject to the jurisdiction of U.S. courts, and therefore, may not be subject to U.S. product liability laws . . .”).

67. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citing cases back to *International Shoe*).

68. *Id.* (emphasis added).

69. Buehler, *supra* note 1.

challenges to receive some benefit from our restrictive personal jurisdiction doctrine because the unpredictable stream of commerce doctrine encourages defendants to make challenges to personal jurisdiction, even when they are not assured of success.<sup>70</sup> Even when a foreign manufacturer unsuccessfully challenges personal jurisdiction, such challenges consume inordinate amounts of time and resources, increasing the plaintiff's costs, and creating pressure to settle or an incentive to forgo suing in the first place.<sup>71</sup> And when a defendant successfully challenges personal jurisdiction, the plaintiff's case comes to a complete halt, even though personal jurisdiction has nothing to do with the merits of his claim. Even if the plaintiff successfully obtains a finding of jurisdiction in the trial court, given the fact that such a finding is not immediately appealable,<sup>72</sup> the plaintiff risks wasting substantial amounts of time and money trying the case to a final judgment only to face the daunting prospect of starting over.<sup>73</sup> As a result, the stream of commerce doctrine both increases a plaintiff's costs, and reduces the chance he will be successful against foreign manufacturers.<sup>74</sup>

The net effect of the increased risk and cost to plaintiffs is that foreign manufacturers can discount the likelihood of being successfully haled before an American court, because plaintiffs have less incentive to sue and

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70.*Id.* at 109 (“[O]ur current personal jurisdiction rules misalign litigation incentives in a socially undesirable way. Unclear and restrictive jurisdictional rules increase the likelihood of procedural disputes, inflate litigation costs, and decrease the expected benefit from suit, making it less likely that plaintiffs will file lawsuits. This in turn increases the likelihood that injurers will escape liability and will be inadequately deterred from engaging in wrongful conduct.”).

71. *Id.* at 129 (“These jurisdictional disputes inflate litigation costs. Parties and the courts allocate significant resources to motions to dismiss and other procedural disputes.”) (citing Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 634 (2009)); Philip Y. Brown, *A Client's Guide to the Litigation Process*, in ADDRESSING A CLIENT'S LITIGATION ISSUES 31, 40 (Eddie Fournier ed., 2008) (“Motions to dismiss are expensive to draft and respond to, and they can cause substantial delays while the motion is briefed, heard by the court, and ruled upon.”); see also Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 440 (1998) (arguing for the need to streamline personal jurisdiction determinations to avoid “expensive and burdensome motion practice”).

72. See 28 U.S.C. § 1291 (2006) (granting federal appellate court jurisdiction for “final decisions”); see also Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 583 (1995) (“[A]n appeal on the jurisdictional issue does not lie until there is a final judgment in the case.”).

73. Buehler, *supra* note 1, at 134 (quoting *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 739–40 (7th Cir. 2004) (“[T]he parties will often find themselves having to start their litigation over from the beginning, perhaps after it has gone all the way through to judgment.”); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (“Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction.”)).

74. Buehler, *supra* note 1, at 131.

a lower probability of success when they do. And with a lower risk of being subject to an American court's jurisdiction, the foreign manufacturer can discount the cost of being found liable for violating American tort law. Thus, a foreign manufacturer does not bear the same costs an American manufacturer must bear.

- E. American consumers injured in this country by foreign manufacturers that are not subject to American personal jurisdiction have no viable alternative remedy.

If an American court sustains a foreign manufacturer's objection to personal jurisdiction, the case against that defendant is over. As a practical matter, the American consumer will be left without a remedy. Only in the abstract can the consumer bring a claim against the manufacturer in its home jurisdiction or recover against the local dealer or distributor who is likely subject to personal jurisdiction.

1. A foreign forum is likely not an adequate substitute for an American consumer.

A consumer faced with the additional time and expense of prosecuting her claim overseas will likely find the cost so prohibitive that she will be unlikely to bring such a claim. Even where a consumer may desire to bring a claim in a foreign forum, foreign procedure and substantive tort law are often less favorable to consumers than U.S. tort law and procedure. For example, plaintiffs in the American tort system have the prospect of generally higher damages than tort plaintiffs in other countries.<sup>75</sup> In the European Union, for example, a plaintiff's product liability claim is subject to more defenses, and damages are more circumscribed.<sup>76</sup> Claimants in the United States can try their product liability cases before a jury, while judges are the decision-makers in judicial systems in the rest of the world.<sup>77</sup>

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75. See, e.g., Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 1029 (1998); Mark A. Behrens & Daniel H. Raddock, *Japan's New Product Liability Law: The Citadel of Strict Liability Falls, but Access to Recovery Is Limited by Formidable Barriers*, 16 U. PA. J. INT'L BUS. L. 669, 711 (1995); Patrick Thieffry et al., *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65, 90 (1989); Lord Griffiths et al., *Developments in English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 401 (1988).

76. Andrew C. Spacone, *Strict Liability in the European Union-Not A United States Analog*, 5 ROGER WILLIAMS U. L. REV. 341, 346 (2000) ("The fact is that the procedural and substantive hurdles to successful products litigation in the European Union are considerably higher than in the United States."); see also Howells & Mildred, *supra* note 75, at 1029; Behrens & Raddock, *supra* note 75, at 711; Thieffry et al., *supra* note 75, at 90; Griffiths, *supra* note 75, at 401.

77. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981) (describing juries as more



American plaintiffs and defendants tend to agree that, on average, plaintiffs fare better with juries than with judges on questions of liability and damages.<sup>78</sup> And unlike their continental counterparts, American plaintiffs generally have access to wide-ranging discovery that is crucial to establishing a product defect in the first place.<sup>79</sup>

The American rules governing lawyer compensation are also more favorable to claimants. The vast majority of plaintiffs in the United States compensate their lawyers using pure contingent fee agreements, which are not available in other countries.<sup>80</sup> For example, Japanese law requires the plaintiff to pay her lawyer an up-front retainer fee in addition to a contingent fee.<sup>81</sup> The retainer fee is set at a percentage of the claimed damages and is substantial enough to render “legal representation unaffordable for many.”<sup>82</sup> In the United States, by contrast, claimants can rely on their counsel both to fund the litigation and bear the risk of an unsuccessful outcome. Other countries, particularly England, further discourage litigation by requiring the losing party to bear the costs of an unsuccessful claim.<sup>83</sup>

2. The local distributor or other intermediary who may be subject to personal jurisdiction in the United States is not an adequate substitute defendant.

The local distributor is not, as industry spokesmen suggest,<sup>84</sup> an adequate substitute defendant, even though the distributor theoretically may be subject to American product liability law.<sup>85</sup> First, the local distributor is inadequate for discovery purposes. It is difficult to overstate the importance of design, testing, and manufacturing documents in product liability cases.<sup>86</sup> By definition, the foreign manufacturer—not the local distributor—

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plaintiff-friendly and generally unavailable in civil law countries).

78. See Kevin M. Clermont, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1162–63 (1992).

79. See *Piper Aircraft*, 454 U.S. at 252 n.18; see also Behrens & Raddock, *supra* note 75, at 706; Thieffry, *supra* note 75, at 88; Griffiths, *supra* note 75, at 402.

80. See *Piper Aircraft*, 454 U.S. at 252 n.18.

81. Behrens & Raddock, *supra* note 75, at 709.

82. *Id.* at 710.

83. Griffiths, *supra* note 75, at 401.

84. Brief for the Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioner, *J. McIntyre Machine, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2010) (No. 09-13432010), 2010 WL 4717267, at \*23–24 (“Indeed, having sellers and distributors available in the United States as strict liability defendants may even increase the likelihood of recovery, given the difficulties that can attend the collection of judgments from foreign defendants.”).

85. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A (1965).

86. Francis H. Hare, Jr., *Discovery in Products Liability Cases: The Plaintiff’s Plea for Judicial*

manufactured (and likely designed and tested) the allegedly defective product. As a result, these crucial documents will be, for all practical purposes, beyond the reach of the American plaintiff because the local distributor does not have possession, custody, or control over these vital documents and information.<sup>87</sup>

The local distributor is also inadequate because he is more likely to escape liability altogether. First, approximately half of all United States jurisdictions have adopted innocent seller defenses that immunize a non-manufacturing seller or distributor from liability.<sup>88</sup> Next, jurors are human beings. They understandably consider blameworthiness in strict liability cases, even though fault may not technically be relevant.<sup>89</sup> Distributors capitalize on human nature and will often defend a product liability claim on the basis that they did not design, test, or manufacture the product and, as a result, could not have made any decision that would have changed the outcome. The local distributor is also more likely to be a local business, and consequently a more sympathetic defendant than an overseas, foreign manufacturer.

#### F. American manufacturers do not compete on a level playing field.

Unlike foreign manufacturers, American manufacturers cannot avoid domestic tort law; the concept of general personal jurisdiction ensures that some American court will have personal jurisdiction over a domestic manufacturer.<sup>90</sup> At the same time, American manufacturers may find it

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*Understanding*, 12 AM. J. TRIAL ADVOC. 413, 415–16 (1989) (“Defective products cases invariably involve numerous highly technical documents pertaining to the development, design, manufacture, and distribution of the defendant’s product. These documents are at the center of the distinctive discovery problems that arise in products liability cases. The collective importance of such documents is undisputed and constitutes the single most important body of evidence in a products case. Indeed, the contents of these documents are relevant not only to the defendant’s liability but also to virtually every issue in the case. The plaintiff’s attorney cannot adequately prepare his client’s case until he obtains these documents. The problem, for the plaintiff, is that the entire body of needed documentation is exclusively in the defendant’s possession.”).

87. See, e.g., *U.S. Int’l Trade Comm’n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (non-party exclusive distributor was not shown to be in control of patent-related documents held by its parent corporation); *Micron Tech., Inc. v. Tessera, Inc.*, 2006 WL 1646133, at \*2 (N.D. Cal. 2006) (the subpoenaed party, a wholly owned U.S. distributor of a foreign manufacturer, did not have to produce documents in the possession and control of the foreign manufacturer).

88. Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1121–36 (2003).

89. See Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 902 (2002).

90. George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115, 147 (1993) (“To the extent that foreign manufacturers can discount the collectability of U.S. products liability judgments, however, their prices

difficult to avoid foreign tort law because other countries do not have a similarly restrictive view of personal jurisdiction. For example, through the Brussels Convention, European law vests jurisdiction in the court where the injury occurred.<sup>91</sup> Unlike U.S. procedure, European procedure permits a plaintiff to sue in the court located where the injury occurred, without regard to whether the defendant had sufficient “contact” with that location. As a result, American manufacturers must consider the cost of complying with both domestic and foreign tort law while foreign manufacturers can reduce the risk of being subject to American tort law.<sup>92</sup>

## II. AMERICAN COURTS ARE GENERALLY RECEPTIVE TO FOREIGN MONEY JUDGMENTS EVEN THOUGH FOREIGN COURTS ARE LESS LIKELY TO ENFORCE AMERICAN MONEY JUDGMENTS

### A. Foreign judgments are relatively easy to enforce in the United States.

State law governs whether a foreign judgment is enforceable and does not pose much of a barrier to enforcement. No treaty or federal statute currently governs whether a foreign judgment can be enforced in the United States. As a result, judgment enforcement is a matter of state law, which is hardly uniform across the states. Foreign litigants who wish to enforce their judgments in an American court must comply with various statutory and common law rules. Despite the patchwork quilt of applicable

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can be set commensurately lower.”).

91. See Council Regulation 44/2001, art. 5, 2001 O.J. (L 12) (EC) [hereinafter Brussels Regulation]. Also known as the Brussels Regulation, it replaced the European or Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, entered into in 1968 by the original Common Market member states. In the interim, the Lugano Convention “extended the Brussels Convention scheme to [European Free Trade Association] countries.” Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 491 n.82 (2006); see also Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (C 189) 88 (EC) [hereinafter E.C. Convention on Jurisdiction].

92. Priest, *supra* note 90, at 147 (“U.S. manufacturers must design their products to comply with U.S. products liability standards reflecting U.S. judgments. This means that, to the extent that greater than compensatory damages—like punitive damages—are awarded, U.S. manufacturers must invest in safety at levels greater than optimal for consumers. In addition, given expanded standards of liability, U.S. manufacturers must insure consumers and pass the proportionate insurance premium along in the product price.”); see also Clarence E. Hagglund & Herbert A. Igbunugo, *Are U.S. Product Liability Laws Acting as a Trade Barrier to the Detriment of U.S. Companies?*, 42 FED. INS. & CORP. COUNS. Q. 347 (1992); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws: Are Foreign Businesses Beating Us at Our Own Game?*, 9 J.L. & COM. 167 (1989); Randolph J. Stayin, *The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers*, 14 CAN.-U.S. L.J. 193 (1988).

laws, the prerequisites to enforcing a foreign judgment are remarkably consistent across the several states and generally not onerous.

The foreign judgment holder typically bears the burden to prove very little.<sup>93</sup> As a preliminary matter, an American court generally will not review the merits of the underlying litigation.<sup>94</sup> The foreign judgment holder need only prove that the judgment is final in the course of a court proceeding, either as a new lawsuit or by way of counterclaim, cross-claim, or defense.<sup>95</sup> The party resisting enforcement bears the burden to establish one of a number of available defenses, which fall into a few generally recognized categories. An American court will not enforce a judgment from a judicial system that lacks impartial tribunals or due process.<sup>96</sup> An American court will also not enforce a judgment if the issuing court did not have jurisdiction over the defendant or over the subject matter of the action.<sup>97</sup> Nor will an American court enforce a judgment procured by fraud, or a judgment that is contrary to public policy.<sup>98</sup> One important element is missing from American judgment recognition and enforcement practice: reciprocity.

In *Hilton v. Guyot*, the seminal case addressing enforcement of foreign judgments, the Supreme Court “provide[d] the foundation for all subsequent common law and statutory formulas for the recognition of foreign judgments.”<sup>99</sup> The Supreme Court held that, as a matter of comity, foreign judgments should be enforced where the foreign court system is fair and impartial, and the proceedings were regular and based on a proper assertion of jurisdiction.<sup>100</sup> Importantly, however, the Court recognized one more requirement founded upon generally accepted international law: the foreign court must also be willing to enforce similar American judgments before an American court would enforce a foreign judgment.<sup>101</sup> Because the Court doubted that French courts would enforce an American judgment, the French judgment at issue in *Hilton* was not enforceable.<sup>102</sup>

Over time, judgment enforcement migrated from federal law to state law, making a uniform state law desirable. In 1962, the National

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93. See Brand, *Recognition and Enforcement*, *supra* note 7, at 6, 8.

94. *Id.*

95. *Id.*

96. *Id.* app. C, at 37–38.

97. *Id.*

98. *Id.*

99. *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

100. *Id.*

101. *Id.* at 210–28.

102. *Id.* at 202–03.

Conference of Commissioners on Uniform State Laws approved and recommended the enactment of the Uniform Foreign Money-Judgments Recognition Act (Uniform Act).<sup>103</sup> At the time, there were many instances in which foreign courts refused to recognize judgments rendered in the United States because of concern for lack of reciprocity—that is, the foreign courts doubted that American courts would recognize their judgments.<sup>104</sup> As of today, thirty-two states have adopted the Uniform Act, and most states have not required reciprocity.<sup>105</sup>

American courts generally do not ask whether the foreign court that rendered the judgment would enforce a similar judgment if it were rendered in the United States.<sup>106</sup> Only eight states consider reciprocity at all, and only two of those states make reciprocity mandatory.<sup>107</sup> Thus, courts in the United States will often enforce a foreign judgment even if the foreign court that rendered the judgment would not enforce an American judgment.<sup>108</sup> Although most U.S. jurisdictions have abandoned reciprocity as a requirement, many foreign countries still require reciprocity before they will enforce American money judgments.<sup>109</sup>

#### B. Foreign courts are generally less receptive to enforcing American money judgments.

Empirical studies demonstrating that American money judgments receive less favorable treatment in foreign courts than foreign judgments receive in American courts do not currently exist. Indeed, sound empirical studies may be practically impossible.<sup>110</sup> Nevertheless, most commentators

103. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (Proposed Official Draft 1962).

104. See, e.g., Brian Richard Paige, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 SEATTLE U. L. REV. 591, 598 (2003).

105. *Foreign Country Money Judgments Recognition Act Summary*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country+Money+Judgments+Recognition+Act> (last visited Jan. 13, 2015).

106. Brand, *Recognition and Enforcement*, *supra* note 7, at 11.

107. *Id.*

108. See, e.g., Matthew H. Adler, *If We Build It, Will They Come?—The Need for A Multinational Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 94 n.86 (1994) (collecting cases enforcing foreign judgments from around the country).

109. See Brand, *Recognition and Enforcement*, *supra* note 7, at 2–3 (“Other countries require proof of reciprocity before recognizing a foreign judgment.”); see also Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 191 (2008) (“[R]eciprocity . . . [is a] further requirement[] in some, but not all, European countries.”); Brand, *Enforcement of Foreign Judgments*, *supra* note 14, at 255 (“In the international arena, enforcement of United States judgments overseas is often possible only if the United States court rendering the judgment would enforce a similar decision of the foreign enforcing court.”).

110. See, e.g., Yaad Rotem, *Economic Regulation and the Presumption Against Extraterritoriality—A New Justification*, 3 WM. & MARY POL'Y REV. 229, 263 (2012) (“[J]urisdictions are not interested in

agree that American courts are much more receptive to foreign judgments than foreign courts are to American judgments.<sup>111</sup> Although not an empirical study, the Committee on Foreign and Comparative Law of the New York City Bar Association conducted a “comprehensive survey” demonstrating the disparate treatment of U.S. money judgments abroad.<sup>112</sup>

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monitoring cooperation in the private ordering context because the necessary information is complex, and obtaining this information incurs considerable costs.”); Baumgartner, *supra* note 109, at 198–99 (“Reliable data on the way the various recognition requirements are actually applied to U.S. judgments in practice are difficult to find. First, most European jurisdictions do not compile information at a level that is sufficiently detailed to pinpoint recognition matters, let alone recognition matters involving U.S. litigants. Thus, researchers interested in such data would have to produce them first by combing through large numbers of judicial records. In most countries, this would have to be done at several levels of government . . . [and] [t]here may be a significant number of judgment creditors who do not bother to bring certain recognition claims or judgment debtors who choose to pay up rather than to risk a court battle . . . . Engaging in this line of research requires a significant amount of time and money. In the meantime, we are forced to look at the second best source of information: published decisions.”); Anyuan Yuan, *supra* note 8, at 758 (“The enforcement of foreign judgments in China has been notoriously difficult in recent years. Due to a lack of transparency and no case reporting system in China, there has not been an empirical study quantifying this difficulty.”).

111. Brand, *Recognition and Enforcement*, *supra* note 7, at 2 (“Other countries tend not to be as liberal as the United States in recognizing and enforcing foreign judgments.”); Baumgartner, *supra* note 109, at 173 (“[O]n average, U.S. judgments face more obstacles in Europe than do European judgments in the United States.”); Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE* 263, 264 (John J. Barceló, III & Kevin M. Clermont eds., 2002) (“So it is a world in which we have, if you will, opened the door to judgments of foreign courts but where many of those same courts have not reciprocated by enforcing our judgments.”); *Negotiation of Convention on Jurisdiction and Enforcement of Judgments*, 95 AM. J. INT’L L. 418, 419 (2001) (“Thus, while U.S. courts are perceived as the most open in the world to the recognition and enforcement of foreign civil judgments in the absence of a treaty obligation to do so, the ability of U.S. judgment holders to enforce their judgments abroad is much more problematic. Even in those countries that will, in principle, enforce foreign judgments in the absence of a treaty, the reach of U.S. long-arm jurisdiction, what they perceive to be ‘excessive’ jury awards, and punitive damages are sometimes considered reasons not to enforce U.S. judgments.”) (quoting Jeffrey D. Kovar, Assistant Legal Adviser, U.S. Dep’t of State, Prepared Statement for Hearing Before the Sub-comm. On Courts and Intellectual Property of the House Comm. On the Judiciary, 106th Cong., at 4–9 (July 29, 2000) (on file at GWU)); Russell J. Weintraub, *How Substantial Is Our Need For a Judgments-Recognition Convention And What Should We Bargain Away to Get It?*, 24 BROOK. J. INT’L L. 167, 170–71 (1998) (acknowledging that empirical proof is lacking while stating the conventional wisdom that foreign courts do not accord reciprocal treatment to U.S. judgments); Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT’L L. 157, 157–158 (1998) (“By international standards, United States recognition of foreign judgments is extremely liberal. . . . By contrast, it is much more difficult to obtain recognition of a U.S. judgment in most foreign nations.”); Adler, *supra* note 108, at 81 (stating that “the consensus” in academic circles and in the U.S. Department of State “is that individuals seeking enforcement of U.S. judgments abroad have not had the same good fortune as foreign litigants seeking enforcement in the United States”); Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 4 (1988) (calling treatment of U.S. judgments abroad “far from satisfactory”).

112. *Survey on Foreign Recognition*, *supra* note 8; Katherine R. Miller, *Playground Politics*:

The Committee found that although the differences between U.S. law and foreign laws of judgment recognition seemed facially similar, in practice, foreign laws “constitute significant obstacles to the efficient recognition of foreign judgments.”<sup>113</sup>

The survey described a number of reasons that domestic money judgments are generally more difficult to enforce abroad.<sup>114</sup> The Committee surveyed practitioners in Belgium, Canada, the People’s Republic of China, England, Wales, France, Hong Kong, Italy, Japan, Mexico, South Africa, Spain, and Switzerland about the procedure for enforcing foreign judgments in their courts.<sup>115</sup> The results of the survey paint a bleak picture for enforcing money judgments in the subject countries. Although the specific reasons were manifold, some of the most serious obstacles to recognition (let alone enforcement) of a domestic money judgment included: (1) differences in the concept of personal jurisdiction, (2) judgments that contravene the public policy of the foreign forum, and (3) practical obstacles, such as the delay and expense in utilizing foreign court procedures.<sup>116</sup>

Many countries consider our concept of personal jurisdiction overly broad and will not enforce judgments unless the American court had personal jurisdiction in accordance with the law of the country where enforcement is sought.<sup>117</sup> For example, Swiss law has a much narrower view of personal jurisdiction, basically requiring that the Swiss national be domiciled in the forum or have unquestionably submitted to the court’s jurisdiction.<sup>118</sup> Similarly, French law grants France “exclusive” jurisdiction in almost all cases involving a French national, and a French court will

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*Assessing the Wisdom of Writing A Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT’L L. 239, 256 n.84 (2004).

113. *Survey on Foreign Recognition*, *supra* note 8, at 381 (“What we found was that the relevant substantive and procedural laws themselves, or more precisely the variances found in them between the United States and the states surveyed, constitute significant hurdles to efficient recognition. While at first glance many of the differences may appear minimal, in the actual reality of daily practice they constitute significant obstacles to the efficient recognition of foreign judgments. These substantive and procedural differences result both from historical and cultural factors and from conscious domestic policy choices, and while their existence is understandable, their impact on international commercial activity is indisputable.”).

114. *Id.* at 381–409 (describing differences in the concept of personal jurisdiction, judgments that contravene the public policy of the foreign forum, and the delay and expense in utilizing foreign court procedures as examples of why judgments are difficult to enforce abroad).

115. *Id.* at 381.

116. *Id.* at 384, 389, 409.

117. *Id.* at 384 (“Most of the states surveyed have concepts of jurisdiction which are inconsistent or incompatible with U.S. concepts of long-arm jurisdiction and are not prepared to see such U.S. concepts expanded into their countries.”).

118. *Id.* at 385–86.

refuse to enforce a foreign money judgment if it determines it has exclusive jurisdiction.<sup>119</sup>

The Swiss lawyer Samuel Baumgartner in his book on the Hague Judgments Convention came to the same conclusion about personal jurisdiction as an impediment to enforcing American money judgments:

Thus, the primary point of discussion that has arisen is based on European and other municipal approaches to the recognition of foreign adjudications that, in a tradition dating back to an epoch of pronounced nationalism, still significantly impede recognition if they do not refuse it altogether. For example, Article 15 of the French *Code Civil* still allows a French national to resist the recognition of any foreign adjudication against him; Swiss law, with a few exceptions, generally prevents the recognition of a foreign judgment *in personam* against a defendant domiciled in Switzerland; and the Nordic countries still generally refuse to accord foreign adjudications any effect absent a treaty obligation to the contrary.<sup>120</sup>

England, Wales, South Africa, Italy, Spain, and Mexico also have similarly restrictive concepts of personal jurisdiction that may preclude enforcement.<sup>121</sup> Commentators familiar with China have also concluded that Chinese concepts of personal jurisdiction are more restricted than the “exorbitant” reach of the American minimum contacts test.<sup>122</sup>

The enforcing court’s public policy is also a likely objection to recognition and enforcement of American money judgments. Some countries give courts wide discretion in determining whether a judgment violates vague notions of justice, morality, liberty, or public order, making enforcement a shot in the dark.<sup>123</sup> More specifically, every jurisdiction surveyed would likely refuse to enforce a judgment containing punitive, exemplary, or other multiple damages as contrary to their public policy.<sup>124</sup> Finally, the time and expense involved in actually enforcing a judgment abroad is often a significant handicap. In many countries, including Canada, South Africa, Spain, Japan, Belgium, Italy, and Mexico, enforcement actions likely take two years and sometimes as long as nine years to complete.<sup>125</sup> These are only some of the obstacles to enforcement that the survey found.

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119. *Id.* at 386.

120. BAUMGARTNER, *supra* note 8, at 184–85.

121. *Survey on Foreign Recognition*, *supra* note 8, at 385–86.

122. *See, e.g.*, Anyuan Yuan, *supra* note 8, at 759.

123. *See Survey on Foreign Recognition*, *supra* note 8, at 381.

124. *See id.*; Anyuan Yuan, *supra* note 8, at 759.

125. *Survey on Foreign Recognition*, *supra* note 8, at 409–10.



### III. THE FAILED HAGUE JUDGMENTS CONVENTION COULD HAVE REDUCED THE ASYMMETRIES IN PERSONAL JURISDICTION AND JUDGMENT ENFORCEMENT

In 1992, the United States initiated negotiations for the Hague Judgments Convention,<sup>126</sup> and in the late 1990s, the U.S. participated in lengthy and intense negotiations, resulting in a draft convention.<sup>127</sup> Despite its name, the Convention was drafted to address not only judgment enforcement, but also judicial (or personal) jurisdiction.<sup>128</sup> The most controversial global question was whether the Convention would exhaustively list the permissible bases of jurisdiction, or whether it would create three categories of jurisdiction: a white list (required), a black list (prohibited), and a gray list (permitted).<sup>129</sup> The white list would be composed of jurisdictional bases that, if used, would entitle the judgment creditor to enforce the judgment in a member state.<sup>130</sup> The black list would be composed of jurisdictional bases that were prohibited but, if exercised nonetheless, would bar a judgment creditor from enforcing the judgment in the other member states.<sup>131</sup> The gray list would be composed of jurisdictional bases that, if used, may or may not entitle the judgment creditor to enforce it abroad, depending upon the domestic law of the state where enforcement is sought.<sup>132</sup>

Somewhat surprisingly, there was very little difference among the Hague Conference members on the mechanics of how to enforce judgments.<sup>133</sup> Essentially, Convention states would be required to enforce judgments where jurisdiction was premised on a “white list” basis, and to deny enforcement of judgments where jurisdiction was premised on a “black list” basis.<sup>134</sup> The Convention also provided generally accepted

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126. Baumgartner, *supra* note 109, at 175–76 (“[T]he United States initiated negotiations for a global convention on the recognition of foreign judgments at The Hague in 1992, hoping that the new treaty would significantly improve the recognition of U.S. judgments in the rest of the world.”); Gralf-Peter Calliess, *Value-Added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy Failed in the Hague*, 5 GERMAN L.J. 1489, 1489 (2004) (“In the early Nineties the Hague Conference on International Private Law on initiative of the United States started negotiations on a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.”).

127. BAUMGARTNER, *supra* note 8, at 4.

128. *Id.* at 3–4.

129. *Id.* at 2–3.

130. *Id.* at 3.

131. *Id.*

132. *Id.*

133. *Id.* at 181.

134. Linda J. Silberman, *Can the Hague Judgments Project be Saved?: A Perspective from the United States*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 159,

discretionary defenses to recognition and enforcement, such as the enforcing state's public policy.<sup>135</sup> Jurisdiction, however, was a much more contentious topic, resulting in the most immediate obstacle to any progress on the Convention.

A. The United States and the European Nations are at an impasse.

The primary goal of the United States has always been to "improve the recognition of U.S. judgments in Europe and elsewhere, while that of continental Europeans (and others) has been to circumscribe the judicial jurisdiction of American courts."<sup>136</sup> In the very earliest meetings, our European Hague Conference negotiating partners complained about "U.S. courts assuming general jurisdiction over cases involving non-U.S. litigants and the problems such assumptions of jurisdiction presented for non-U.S. parties."<sup>137</sup> The American delegation, however,

[C]hallenged our colleagues to furnish us with examples of such cases but received not a single report of such a case . . . . We recognize that many non-U.S. parties object to having to litigate in the United States, but the issue is whether general jurisdiction is the problem. We see little evidence that it is.<sup>138</sup>

There is a common misconception that notions of personal jurisdiction are much broader in the U.S. than they are in Europe; indeed, American and European bases of personal jurisdiction overlap considerably.<sup>139</sup> The European countries' real objection seems to be the conduct of American litigation, with its wide-ranging discovery and the prospect of large

180 (John J. Barceló, III & Kevin M. Clermont eds., 2002); *see also* Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 118-19 (1998) (describing a mixed convention such as the Hague Judgments Convention as containing "white," "black," and "gray" bases for exercising jurisdiction).

135. *Id.* at 180 n.122.

136. BAUMGARTNER, *supra* note 8, at 185-86; *see also* Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 639 (2000) ("For other countries, whose judgments are already enforced here in the absence of a treaty and without any requirement of reciprocity, the primary interest in a convention is in establishing a narrower scope of jurisdictional authority over their domiciliaries.").

137. Trooboff, *supra* note 111, at 273.

138. *Id.*

139. *See* Silberman & Lowenfeld, *supra* note 136, at 639 n.22 ("It is a common but incorrect assumption that judicial jurisdiction of United States courts is more expansive than that of other countries. The United States and many European countries have remarkably similar jurisdictional bases in many situations, and often the jurisdictional reach of foreign courts is broader than that of United States courts, particularly in multiparty cases where jurisdiction over one defendant establishes jurisdiction over other defendants.") (citation omitted).

damages.<sup>140</sup> As one non-governmental member of the American delegation noted:

[T]o be frank, United States judgments are feared in the rest of the world. There is genuine concern over the assertion of jurisdiction by United States courts because of the size of the awards that juries in the United States are *believed* to grant in civil litigation. Empirical evidence to the contrary, newspaper publicity about multimillion dollar judgments for injuries suffered from an overly hot cup of coffee is not readily overcome. Further, there is a *perception* that United States courts assert jurisdiction in circumstances that courts of other nations would not. As a result, when other countries in the Hague Conference and certainly European countries, came to the table to start this exercise, they had a single, clear objective in mind, which was to limit and restrict to the maximum extent possible, the jurisdiction that the United States courts assert.<sup>141</sup>

During Convention negotiations, the U.S. interest in judgment enforceability and the European interest in limiting the jurisdiction of U.S. courts were “pitted” against each other, and “so overpowered the discussions that delegates from other countries had difficulty bringing to bear their own insights and concerns.”<sup>142</sup> Unfortunately, by the year 2000, the United States and the European Union had arrived at an impasse.

In 2000, at the request of the U.S. State Department, negotiations were postponed.<sup>143</sup> Although many issues remain unresolved, many of the most controversial issues from the American perspective have to do with European attempts to limit American personal jurisdiction.<sup>144</sup> For example, would general *in personam* or “doing business” jurisdiction be on the black list or the gray list?<sup>145</sup> Could we come to an agreement on specific bases of jurisdiction for contracts, and would they favor consumers and employers at the expense of businesses and employers?<sup>146</sup> The American delegation, for its part, seemed prepared to negotiate away perhaps the most obvious example of jurisdictional overreaching in the United States: “tag” jurisdiction established by personal service in the forum state.<sup>147</sup> The

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140. Trooboff, *supra* note 134, at 267.

141. *Id.* (emphasis added).

142. BAUMGARTNER, *supra* note 8, at 4–5.

143. *Id.* at 5.

144. *Id.* at 4–6.

145. *Id.* at 6.

146. Trooboff, *supra* note 111, at 270.

147. *Id.* at 285; *see also* *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (“[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of “traditional notions of fair play and substantial justice.”).

American delegation even seemed willing to compromise on “excessive” damages.<sup>148</sup> The Europeans, however, had little incentive to compromise in their efforts to circumscribe what they perceived to be exorbitant American jurisdiction.<sup>149</sup> As the State Department’s advisor testified to Congress, “[s]ince litigants from most developed countries have no substantial difficulties enforcing judgments in the United States, their governments believe they have substantial negotiating leverage over us.”<sup>150</sup> Other nongovernmental members of the American delegation agree that the difference between how the United States and other countries treat foreign judgments “puts the United States in a weaker bargaining position when we sit at the negotiating table at the Hague Conference.”<sup>151</sup> Certainly many more obstacles—some of them very problematic—remain. For example, will the Convention address antitrust judgments? What about intellectual property? And what about the thorny issue of jurisdiction over e-commerce businesses? For now, however, the United States and Europe remain at loggerheads, and without a change in dynamics, these and other important issues will remain unresolved, and the Hague Judgments Convention will fade into history as nothing more than an interesting academic exercise.

B. The Convention would have benefitted U.S. consumers by making the place of injury a valid basis for personal jurisdiction.

One of the principal benefits to U.S. consumers injured by a foreign manufacturer’s products would have been the Convention’s personal jurisdiction provision.<sup>152</sup> The Convention would have allowed a plaintiff to bring suit in the state where the injury originated.<sup>153</sup> The Convention essentially incorporated the rule as it exists in the European Union, which grants personal jurisdiction over the parties to the court of the forum where

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148. Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 281, 284–285 (John J. Barceló, III & Kevin M. Clermont eds., 2002).

149. *Negotiation of Convention on Jurisdiction and Enforcement of Judgments*, *supra* note 111, at 419–20.

150. *Id.*

151. Trooboff, *supra* note 111, at 264.

152. Preliminary Draft Convention, *supra* note 9, art. 10(1) (“A plaintiff may bring an action in tort or delict in the courts of the State . . . in which the injury arose . . .”).

153. See George L. Droz, *Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: Provisions on Jurisdiction*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 15, 23 (John J. Barceló, III & Kevin M. Clermont eds., 2002) (citing Preliminary Draft Convention, *supra* note 9, art. 10(1)).

the injury occurred.<sup>154</sup> European Union regulations provide for the exercise of specific jurisdiction “in matters relating to tort . . . in the courts for the place where the harmful event occurred.”<sup>155</sup> The Court of Justice of the European Communities has interpreted “where the harmful event occurred” as including both “the place where the damages occurred or . . . the place of the event which gives rise to and is at the origin of that damage.”<sup>156</sup> As a result, the Convention would have granted courts in the United States personal jurisdiction over defendants on the basis that the injury occurred in the forum jurisdiction. However, this rule would conflict with Supreme Court rulings that the mere occurrence of an injury in the forum is not sufficient to establish personal jurisdiction over the defendant.<sup>157</sup>

C. The Hague Judgment Convention’s personal jurisdiction provision as drafted, however, would have been unconstitutional.

Even if the United States had ratified the Hague Convention, American courts likely would have found its treatment of personal jurisdiction to be unconstitutional. The precise relationship between treaties and the Constitution is not perfectly clear in the United States. Although the Constitution includes a Supremacy Clause establishing that treaties prevail in any conflict with state law, the Supremacy Clause does not resolve conflicts between treaties and other domestic law, including specifically the Constitution. Reasonable minds can disagree as to whether treaties can, under some circumstances, expand the power of an otherwise limited federal government—even in the specific context of a potential conflict between Supreme Court personal jurisdiction doctrine and the Hague Judgments Convention.<sup>158</sup> The Supreme Court’s resolution of *Reid*

154. Brussels Regulation, *supra* note 91, art. 4 at 16; *see also* E.C. Convention on Jurisdiction, *supra* note 91, at 98.

155. Brussels Regulation, *supra* note 91, art. 5(2); *see also* E.C. Convention on Jurisdiction, *supra* note 91, at 98.

156. Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 550 (1995); *see also* Case 21/76, *Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d’Alsace S.A.*, 1976 E.C.R. 1735, 1748 (holding that created the doctrine of “alternative jurisdiction,” permitting the plaintiff to sue either where the act or omission occurred or where the injury originated).

157. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–97 (1980) (collecting cases and explaining how the occurrence of an injury in a location is not sufficient to establish personal jurisdiction); *see also, e.g.,* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (“[F]oreseeability of causing injury in another State . . . is not a sufficient benchmark for exercising personal jurisdiction.”) (internal quotations omitted).

158. *See* *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that a treaty was constitutional although similar congressional legislation had been held unconstitutional); *see also* *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (holding that executive agreements touching on foreign relations can, even in the absence of any explicit Congressional approval—whether by consent of the Senate or Congressional legislation—can survive constitutional scrutiny); Patrick J. Borchers, *Judgments*

*v. Covert*, however, creates a significant risk that the Supreme Court will refuse to apply the treaty's personal jurisdiction provision.<sup>159</sup>

In *Reid v. Covert*, the wife of an American serviceman killed her husband while they were living on an American military base in Britain.<sup>160</sup> The United States Military tried her in a military tribunal pursuant to the Uniform Code of Military Justice, which did not provide for a jury trial.<sup>161</sup> The wife challenged her conviction, arguing that she was entitled to a jury trial under Article III, section 2, and the Fifth and Sixth Amendments to the U.S. Constitution.<sup>162</sup> The United States claimed that the treaty between the U.S. and Great Britain granted military courts jurisdiction over servicemen and their dependents when they commit crimes in Great Britain; therefore, the treaty justified a military trial of a civilian, without a jury.<sup>163</sup> The Supreme Court disagreed, holding that the treaty conflicted with specific rights granted by the Constitution, which must prevail.<sup>164</sup> As a result, the treaty could not impair the defendant's constitutional rights.<sup>165</sup>

The Supreme Court seems likely to come to a similar result in the event of a conflict between the Hague Judgments Convention and the Due Process Clause. The Court has long held that personal jurisdiction is a personal due process right, premised on the due process clauses of either the Fifth or Fourteenth Amendment.<sup>166</sup> As described above, the Court has also repeatedly held that the mere occurrence of an injury in the forum is not sufficient to establish personal jurisdiction over the defendant.<sup>167</sup> The Hague Judgments Convention as drafted, however, does just that; it makes the occurrence of an injury in the forum a valid basis for exercising

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*Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161, 1173–74 (1998) (“It is, of course, not my contention that any provision in any treaty or convention will automatically withstand constitutional challenge. But it gives far too little weight to the special nature of foreign affairs to assume that some modest adjustments to our jurisdictional regime will provoke the Supreme Court’s ire, and cause it—for the first time in history—to strike down a treaty provision as unconstitutional.”).

159. *Reid v. Covert*, 354 U.S. 1 (1957); *cf.* *Cook v. United States*, 288 U.S. 102, 119 (1933) (holding that subsequent treaty should be given effect over prior, inconsistent federal statute).

160. *Reid*, 354 U.S. at 3.

161. *Id.*

162. *Id.* at 5.

163. *Id.*

164. *Id.* at 6.

165. *Id.*

166. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

167. *See, e.g., World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295–97 (1980) (collecting cases and explaining how the occurrence of an injury in a location is not sufficient to establish personal jurisdiction); *see also, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (“[F]oreseeability of causing injury in another State . . . is not a sufficient benchmark for exercising personal jurisdiction.”) (internal quotations omitted).

jurisdiction over the defendant in that forum. In cases where a foreign manufacturer's product injures an American and no other "contact" apparently exists, the defendant can credibly argue that the Constitution trumps the treaty.

D. The United States should amend the Convention to incorporate the concept of consent.

Consent has always been a valid basis for establishing personal jurisdiction.<sup>168</sup> Personal jurisdiction is a "personal" defense—a defendant has an individual right to contest the forum court's personal jurisdiction, and the defendant may always waive that right.<sup>169</sup> Although personal jurisdiction is a "personal" defense, a sovereign has the authority to subject its own citizens to a foreign court's jurisdiction.<sup>170</sup> Extradition treaties are one obvious example. The United States has extradition treaties with over 100 countries,<sup>171</sup> many of which explicitly permit the United States to extradite its own citizens to face charges in foreign courts.<sup>172</sup> In fact, under United States law, the Secretary of State may extradite a U.S. citizen to a foreign country even where the specific extradition treaty with that foreign sovereign exempts U.S. citizens from extradition.<sup>173</sup> And the Supreme Court has held that no principle of international law prohibits a sovereign

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168. See, e.g., *Burger King*, 471 U.S. at 473 (forum selection clause); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (forum selection clause).

169. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest . . . . Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

170. See, e.g., 18 U.S.C. § 3196 (1990) (authorizing extradition of U.S. citizens); *Dames & Moore v. Regan*, 453 U.S. 654, 665 (1981) (affirming executive agreement that subjected U.S. citizens to special civil claims process in dispute with Iran).

171. 18 U.S.C. § 3181 (1996). The list of treaties appended to § 3181 can be found at 18 U.S.C. § 3181–Notes, CORNELL LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uscode/text/18/3181> (last visited Mar. 11, 2015).

172. See, e.g., *Escobedo v. United States*, 623 F.2d 1098, 1104 (5th Cir. 1980) (United States–Mexico Extradition Treaty); *Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977) (United States–Sweden Extradition Treaty).

173. See 18 U.S.C. § 3196 ("If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention are met."). The executive, however, does not have unbridled authority to extradite U.S. citizens; rather, some statute or treaty must authorize extradition. See *Valentine v. U.S. ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.").

from extraditing its citizens and subjecting them to a foreign courts' jurisdiction.<sup>174</sup>

Sovereigns may also agree to subject their citizens to the jurisdiction of international tribunals. For example, the Supreme Court upheld an executive order doing just that in *Dames & Moore v. Regan*.<sup>175</sup> In early 1981, the President issued executive orders implementing an agreement with Iran that resolved the Iranian Hostage Crisis.<sup>176</sup> The President suspended all claims between American and Iranian nationals or their respective governments and referred such claims to binding arbitration at the newly created Iran-United States Claims Tribunal.<sup>177</sup> In holding that such orders were constitutional, the Supreme Court discussed how "the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries . . . in return for lump-sum payments or the establishment of arbitration procedures."<sup>178</sup> Similarly, the International Criminal Court exercises jurisdiction over individuals, including citizens and non-citizens alike, who commit genocide, crimes against humanity, or war crimes within a signatory state.<sup>179</sup> Both U.S. domestic law and international law apparently recognize a sovereign's authority to subject its own nationals to the jurisdiction of a foreign court or tribunal. Under the circumstances currently described in the Hague Judgments Convention, neither the United States nor its Hague Conference negotiating partners should have any difficulty with treaty language stating that the signatory countries "consent" to jurisdiction in the courts of other signatory countries.

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174. *Charlton v. Kelly*, 229 U.S. 447, 467 (1913) ("The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons,' where no such exception is made in the treaty itself.").

175. *Dames & Moore*, 453 U.S. at 665.

176. *Id.*

177. *Id.*

178. *Id.* at 679.

179. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90; *see also Jurisdiction and Admissibility*, INT'L CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx) (last visited Jan. 15, 2015).



#### IV. DOMESTIC LAW CAN ALLEVIATE THESE JURISDICTIONAL AND ENFORCEMENT DISPARITIES AND CREATE INCENTIVES FOR OUR NEGOTIATING PARTNERS TO AGREE TO A REVISED HAGUE JUDGMENTS CONVENTION

##### A. The Foreign Manufacturers Legal Accountability Act can establish personal jurisdiction over foreign manufacturers.

In response to well-publicized foreign defective products like toxic drywall and children's toys contaminated with lead, members of Congress from both sides of the aisle have proposed legislation designed to establish personal jurisdiction over foreign manufacturers whose products are sold in the United States. This bipartisan legislation is known as the Foreign Manufacturers Legal Accountability Act (FMLAA), and would require the manufacturer of a covered product to register an agent for service of process in one state, who is authorized to accept service of process.<sup>180</sup> The FMLAA also provides that, by registering an agent, the foreign manufacturer consents to personal jurisdiction in the courts of the state in which the manufacturer maintains the registered agent.

Both an international trade group and a think tank have criticized the FMLAA on several grounds, none of which is a persuasive reason for rejecting the FMLAA. One trade group claims that the “cost of maintaining such a registered agent would be significant, especially for some of the smaller exporters.”<sup>181</sup> Such an objection may stem from a lack of information about the availability of outsourcing. Foreign manufacturers would not actually have to rent an office in the United States and hire full-time lawyers to staff that office. Many companies in the United States already provide very inexpensive, convenient, and efficient registered agent services for companies, both foreign and domestic, needing to establish a resident agent who can accept service of process.<sup>182</sup> Because the providers serve as agents for numerous companies, these services are very inexpensive. Registered agent service providers charge less than \$200 per

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180. See FMLAA, *supra* note 10.

181. Pritam Banerjee, *The Foreign Manufacturers Liability and Accountability Act: a major concern for Indian exporters to the US*, WORLD COM. REV. 1 (Sept. 2010), [http://www.worldcommerce-review.com/publications/article\\_pdf/294](http://www.worldcommerce-review.com/publications/article_pdf/294).

182. See, e.g., LEGAL ZOOM, <http://www.legalzoom.com/additional-business-services/registered-agent-services.html> (last visited Feb. 5, 2015) (offering registered agent services for \$159 per year); INCORP, <http://www.incorp.com/registered-agent-resident-agent-services.aspx> (last visited Feb. 5, 2015) (offering registered agent services for \$99 a year); REGISTERED AGENTS, <http://www.registeredagents.com/> (last visited Feb. 5, 2015) (offering registered agent services for \$59 per year or as low as \$40 per year for multi-year orders).

year for such services and some companies charge less than \$50 per year.<sup>183</sup> One hundred dollars per year is hardly a significant cost, even for the smallest exporters. These services are also efficient—they can scan and deliver any papers served on the agent to the foreign company electronically and almost instantly. Even the Congressional Budget Office (CBO), which evaluated the cost to foreign companies of complying with the original version of the FMLAA using industry-provided information, concluded the cost would not be significant.<sup>184</sup> Moreover, as described below, the FMLAA can and should be revised to eliminate any need to actually register and maintain an agent.

The international trade group also objects to the FMLAA on the grounds that it imposes significant costs on importers, which would raise the prices of imported goods and harm the economy.<sup>185</sup> These claims are not supported by actual cost estimates and may be overstated.<sup>186</sup> In its scoring of the original version of the FMLAA, the CBO concluded that the cost to private companies to comply with the substantive portions of the FMLAA “would probably exceed” the reporting threshold under the Unfunded Mandates Reform Act, which was approximately \$141 million in 2010.<sup>187</sup> Taking the CBO’s estimate, and assuming that manufacturers would simply pass along the cost to consumers, spreading \$141 million per year of compliance costs across foreign imported goods, which totaled more than \$2.5 trillion last year, would impact consumers by adding approximately 0.006% to the price.<sup>188</sup> This is roughly equivalent to half a cent for a \$100 good, or roughly \$1 for a \$20,000 good. Certainly the cost could exceed the CBO’s estimate of \$141 million, and the burdens would not fall equally on all imported goods. But the miniscule nature of the burden in proportion to the enormous volume and value of foreign trade suggests that the burden would not be significant.

The CATO Institute (CATO) also criticizes the FMLAA as an

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183. LEGAL ZOOM, *supra* note 182; INCORP, *supra* note 182; REGISTERED AGENTS, *supra* note 182.

184. See CONG. BUDGET OFFICE, H.R. 4678 FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT OF 2010, at 2 (2010) [hereinafter BUDGET OFFICE COST ESTIMATE] (“Based on information from industry sources about the cost of hiring or appointing registered agents and on the small incremental difference between current safety standards for consumer products and the legislation’s requirement, CBO estimates that the cost to comply with those mandates would not be significant.”).

185. See Banerjee, *supra* note 181, at 1.

186. See BUDGET OFFICE COST ESTIMATE, *supra* note 184, at 2.

187. See *id.*

188. See U.S. CENSUS BUREAU & U.S. BUREAU OF ECONOMIC ANALYSIS, U.S. INT’L TRADE IN GOODS AND SERVICES (Jan. 2013); see also *The People’s Republic of China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 11, 2014), <http://www.ustr.gov/countries-regions/china> (explaining that imports of goods from China alone in 2011 amounted to almost \$400 billion).

impermissible trade barrier. CATO claims that the FMLAA would violate Article III of the General Agreement on Trade and Tariffs (GATT) because the FMLAA supposedly discriminates against foreign products by requiring the foreign manufacturer to register an agent, while exempting domestic manufacturers from this requirement.<sup>189</sup> Such discrimination would supposedly violate the “national treatment” provision found in Article III:4 of the GATT, an important treaty administered by the World Trade Organization.<sup>190</sup> National treatment, however, “only applies once a product, service or item of intellectual property has entered the market.”<sup>191</sup> Therefore, “charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.”<sup>192</sup> Here, the FMLAA requires a foreign manufacturer to register an agent as a condition of having its goods imported into the United States. Like a custom or duty, the FMLAA applies to the manufacturer *before* its product enters the United States market. Thus, the FMLAA does not violate the “national treatment” or “nondiscrimination” principle as CATO suggests.

Both critics also claim that the FMLAA’s registration requirements violate GATT Article XI, which prohibits any restrictions on imports, other than “duties, taxes, or other charges.”<sup>193</sup> CATO acknowledges, however, that GATT Article XX permits WTO members like the United States to deviate from Article XI in order to “protect human, animal or plant life or health,”<sup>194</sup> or “to secure compliance with laws or regulations.”<sup>195</sup> CATO also acknowledges that “[t]he safety issues behind the bill are real enough” and that the FMLAA’s “principal goal is to protect American consumers from unsafe foreign products.”<sup>196</sup> CATO claims, however, that the FMLAA is not “necessary” because the Hague Service Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) already meets the

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189. See Daniel Griswold & Sallie James, “*Consumer Safety*” Bill Could Boomerang against U.S. Manufacturers, CATO: FREE TRADE BULL. 42, at 2 (Sept. 28, 2010), <http://object.cato.org/sites/cato.org/files/pubs/pdf/FTB-042.pdf>.

190. *Id.*

191. WORLD TRADE ORG., *Principles of the trading system*, UNDERSTANDING THE WTO: BASICS, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Jan. 15, 2015).

192. *Id.*

193. General Agreement on Tariffs and Trade art. XI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; see Griswold & James, *supra* note 189, at 3; see also Banerjee, *supra* note 181.

194. GATT, *supra* note 193, art. XX[b].

195. GATT, *supra* note 193, art. XX[d].

196. Griswold & James, *supra* note 189, at 1.

FMLAA's public policy goals. CATO's criticism stems from a misunderstanding of the Hague Service Convention and how the Convention operates in practice.

The Convention also does not obviate the need for the FMLAA.<sup>197</sup> First, the Hague Service Convention, as the name suggests, deals only with service, not personal jurisdiction.<sup>198</sup> Service and personal jurisdiction are distinct concepts. Serving a foreign manufacturer via the Hague Service Convention does not establish personal jurisdiction over the foreign manufacturer.<sup>199</sup> Second, although the Hague Service Convention is a widely ratified multilateral treaty, it is not universal. Many countries are not signatories to the Hague Service Convention, including countries in South America, Africa, the Middle East, and Southeast Asia.<sup>200</sup> Third, even if the Hague Service Convention could somehow establish personal jurisdiction over a foreign manufacturer, it is an inefficient and unreliable mechanism that fails to actually effect service nearly one-third of the time.<sup>201</sup> The FMLAA provides a more legitimate method to achieve the important public policy goal of protecting U.S. consumers.

Critics further claim that the FMLAA invites retaliatory legislation from foreign countries, requiring American companies to subject themselves to personal jurisdiction in product liability lawsuits in underdeveloped or even corrupt judicial systems.<sup>202</sup> This criticism is misplaced. First, an underdeveloped or manifestly corrupt judicial system is unlikely to be located in an industrialized nation—the type of nation with which we would be more likely to be concerned about trade wars. More importantly, however, many industrialized nations already have rules that would subject the American exporter to a foreign court's personal jurisdiction, and thus potential liability, if the American exporter's

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197. The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361 [hereinafter Hague Service Convention].

198. See Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMPLE L. REV. 331, 332 (2014) (explaining that the Hague Service Convention is a multilateral treaty that provides methods for accomplishing service of process on foreign parties).

199. See Hague Service Convention, *supra* note 197, at art. 1 (indicating that the Convention applies only to civil or commercial matters that require service of judicial or extrajudicial documents).

200. See Hague Conference on Private Int'l Law, *Status Table 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, THE WORLD ORG. FOR CROSS-BORDER CO-OPERATION IN CIV. AND COM. MATTERS (Aug. 22, 2014), [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17](http://www.hcch.net/index_en.php?act=conventions.status&cid=17).

201. Porterfield, *supra* note 198, at 346.

202. See Letter from the National Association of Manufacturers, Organization for International Investment, to Senate (Dec. 12, 2011) (expressing opposition to the FMLAA).

defective product harms a foreign national in his home country.<sup>203</sup> Indeed, the whole purpose of the FMLAA is to bring America's overly restrictive concept of personal jurisdiction more in line with the rest of the world.<sup>204</sup> And if a foreign national attempts to enforce a judgment in the United States against a U.S. manufacturer where the judgment was obtained via fraud or a corrupt judicial system, the law already protects the U.S. manufacturer.<sup>205</sup> U.S. manufacturers already run the risk of unfair treatment abroad—the FMLAA is designed to rectify the unfair treatment of these manufacturers at home.

Finally, critics claim that the FMLAA as currently worded would be unconstitutional because it requires foreign manufacturers to consent to personal jurisdiction without regard for those foreign manufacturers' contacts with the forum state.<sup>206</sup> The Supreme Court has long recognized that registration statutes like the FMLAA, where a company is required to establish an agent who consents to personal jurisdiction as a condition of doing business in the forum state, are constitutional.<sup>207</sup> Even before the

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203. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 322-23 (2002) (“[I]t is interesting to note that in many respects U.S. assertions of judicial jurisdiction are actually narrower than those in many civil law countries and even other common law countries. For example, civil law countries have, in some circumstances, asserted jurisdiction based on the nationality of the plaintiff and have provisions for unlimited jurisdiction based on property in their state. Jurisdictional bases such as these have been identified as ‘exorbitant’ under the Brussels/Lugano regimes and may not be exercised as against domiciliaries of those countries. Nonetheless, assertions of jurisdiction on these grounds are appropriate with respect to defendants from other countries, *including U.S. defendants.*”) (emphasis added); Clermont & Palmer, *supra* note 91, at 486 (“In short, U.S. interests are being whipsawed: not only are U.S. citizens still subject, in theory, to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but, in practice, U.S. judgments tend to receive short shrift in European courts.”); *see also* Brussels Regulation, *supra* note 91, art. 4 (explaining that the jurisdictional laws of member states still control the exercise of personal jurisdiction over persons domiciled outside a member state).

204. *See* FMLAA, *supra* note 10 (“United States laws and the laws of United States trading partners should not put burdens on foreign manufacturers and producers that do not apply to domestic companies”).

205. *See* *Hilton v. Guyot*, 159 U.S. 113, 202 (1895) (“[T]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment . . . .”); *see also* RESTATEMENT (SECOND) OF CONFLICTS § 98, cmt. c (1971) (citing *Hilton*).

206. *See, e.g.,* *Griswold & James*, *supra* note 189, at 1.

207. *Lafayette Ins. Co. v. French*, 59 U.S. 404, 406 (1855); *Pa. Fire Ins. Co. of Phila. v. Gold Issue & Milling Co.*, 243 U.S. 93, 96 (1917); *see also* *Shaffer v. Heitner*, 433 U.S. 186, 201 (1977) (noting that a foreign corporation's consent to jurisdiction pursuant to a consent statute would have justified exercise of general jurisdiction).

Fourteenth Amendment was adopted, the Court upheld a registration statute compelling a corporation to consent to personal jurisdiction in suits connected with its transactions in the state.<sup>208</sup> Moreover, the Supreme Court has blessed a state statute that required an out-of-state corporation to consent to general jurisdiction in the courts of that state, even where the claim did not arise out of the corporation's business in that state.<sup>209</sup> At least as applied to the FMLAA, which would require express consent to jurisdiction for claims involving the manufacturer's product in return for the privilege of having the manufacturer's product sold in the United States, this form of consent has a long history of approval from the Supreme Court and is likely constitutional.<sup>210</sup>

B. The FMLAA is flawed, however, and should be amended.

Although the FMLAA is an admirable start, it does not go nearly far enough. One of its flaws lies in requiring the foreign manufacturer to designate an agent in only one state. Most significantly, this promotes a race to the bottom. Because the FMLAA requires designation of an agent in only one state, a foreign manufacturer will rationally decide to designate an agent in the state that is the most favorable to the manufacturer, or the most unfavorable to the consumer. A foreign manufacturer may choose to designate an agent in the state with the least claimant-friendly product liability law. Similarly, a foreign manufacturer may choose to designate an agent in the state with the least claimant-friendly juries. A foreign manufacturer may also choose to designate an agent in the state that is the most geographically inconvenient for most potential claimants, such as Hawaii or Alaska. As a result, the FMLAA should be revised to require

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208. *Lafayette*, 59 U.S. at 407 (1855).

209. *Pa. Fire*, 243 U.S. at 96; see also *Shaffer*, 433 U.S. at 201 (noting that a foreign corporation's consent to jurisdiction pursuant to a consent statute would have justified exercise of general jurisdiction); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 444 (1952) (noting that the physical presence of a foreign corporation's authorized agent would warrant the exercise of general jurisdiction); *Smolik v. Phila. & Reading Coal & Iron Co.*, 222 F. 148, 150–51 (S.D.N.Y. 1915) (holding that a foreign corporation's designation of an agent for service of process was valid for a wide range of actions); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1077 (N.Y. 1916) (finding that the voluntary appointment of an agent created personal jurisdiction).

210. See *Burnham v. Superior Court*, 495 U.S. 604, 622 (1990) ("But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.") (Scalia, J.); see also Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 34–41 (1990) (discussing whether registration statutes can confer general personal jurisdiction and whether registration statutes that infer consent are constitutional after *Shaffer's* statement that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.) (citing *Shaffer*, 433 U.S. at 212 (1977)).

foreign manufacturers, as a condition of having that manufacturer's product distributed in any state of the United States, to consent to personal jurisdiction in any court that is an otherwise proper venue. As a practical matter, this will result in personal jurisdiction in a state where a significant part of the events or omissions took place—namely, the injury—making personal jurisdiction compatible with the Brussels philosophy.<sup>211</sup> As revised, the FMLAA will reduce the asymmetry in personal jurisdiction because foreign manufacturers will be subject to personal jurisdiction, and American tort law, to at least the same extent as American manufacturers.

C. Congress should enact the ALI's Foreign Judgments Recognition and Enforcement Act, incorporating a reciprocity requirement.

The ALI's Foreign Judgments Recognition and Enforcement Act can also help level the playing field and provide incentives to our Hague Conference negotiating partners to return to the negotiating table.<sup>212</sup> While the Hague Conference on Private International Law was negotiating the Hague Judgments Convention, the State Department requested the American Law Institute to begin drafting federal legislation designed to implement the Hague Judgments Convention.<sup>213</sup> Although negotiations stalled, the ALI decided that United States law would still benefit from a uniform federal approach to enforcing foreign judgments, as opposed to the current state-by-state approach with its patchwork quilt of applicable laws.<sup>214</sup> To that end, the ALI drafted proposed federal legislation known as the Foreign Judgments Recognition and Enforcement Act (FJREA).<sup>215</sup> The FJREA's most controversial—and most important—departure from current foreign judgment recognition practice is the way it revives the concept of reciprocity. That is, a domestic court will not enforce a foreign judgment where the issuing court would not enforce a similar judgment.<sup>216</sup>

As a preliminary matter, it seems uncontroversial to recognize that Congress has the authority to return foreign judgment recognition from

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211. Service can continue to be effected through an agent required to be designated in at least one state as originally contemplated by the FMLAA, through the Hague Service Convention or other treaty concerning service. *See* Porterfield, *supra* note 198.

212. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, ANALYSIS AND PROPOSED FEDERAL STATUTE, at xiii (2005).

213. *Id.*; *see* Silberman & Lowenfeld, *supra* note 136.

214. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 212, at xiii; *see* Silberman & Lowenfeld, *supra* note 136.

215. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 212, at xiii; *see* Silberman & Lowenfeld, *supra* note 136; *see also* Brand, *Recognition and Enforcement*, *supra* note 7, at 6, 8.

216. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 212, at xiii–xiv.

state to federal control. Congress could enact a uniform federal law for the enforcement of foreign judgments under its Foreign Commerce Clause power.<sup>217</sup> Congress also has the authority to enact the FRJEA as touching upon foreign relations.<sup>218</sup> And the FRJEA is also consistent with Federal Rule of Civil Procedure 69.<sup>219</sup> Rule 69 need not be amended because, although the rule requires federal courts to follow state judgment enforcement procedures, Rule 69(a) already provides that any federal statute governs to the extent it applies.<sup>220</sup>

The FJREA reflects a broad policy to enforce final judgments issued by foreign courts and, like existing state law, precludes a court from reviewing the underlying suit on the merits.<sup>221</sup> Also like existing law, the party opposing the foreign judgment bears the burden to establish that the rendering court did not have jurisdiction over his person.<sup>222</sup> The party resisting enforcement also similarly bears the burden to establish some defect with the foreign judgment in particular, or the foreign court system in general, such as a fraudulently obtained judgment or a corrupt court system.<sup>223</sup> The key difference between the FJREA and the prevailing practice in the United States is found in Section 7, entitled “Reciprocal Recognition and Enforcement of Foreign Judgments”: “[a] foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.”<sup>224</sup>

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217. See U.S. CONST. art. I, § 8, cl. 3; Brand, *Enforcement of Foreign Judgments*, *supra* note 14, at 257.

218. Whitten, *supra* note 15, at 582 n.133 (“Although Congress possesses enumerated powers that would support such legislation [the ALI’s draft FJREA] in some of its applications, such as the foreign commerce power the implied power over foreign affairs might be necessary to sustain application of the legislation to all cases.”) (citations omitted); see also Goldsmith, *supra* note 15, at 1634–35 (1997) (“Such suits typically implicate issues that fall in the gray zone between substance and procedure: transnational choice of law, transnational forum non conveniens, the enforcement of transnational forum selection clauses, and the recognition of foreign judgments. These issues are not governed by enacted federal law. The question thus arises whether they are governed by state law or federal common law. The Supreme Court has not resolved this question. But some lower courts have ruled that these issues implicate federal foreign relations interests and should be governed by the federal common law of foreign relations. Commentators overwhelmingly agree with this conclusion.”); HENKIN, *supra* note 15, at 16–22, 70–72 (discussing the unenumerated foreign affairs power of Congress).

219. FED. R. CIV. P. 69(a)(1) (“The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.”)

220. *Id.*

221. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 212, § 2, cmt. d.

222. *Id.* § 3(b).

223. *Id.* § 5.

224. *Id.* § 7(a).



The ALI made reciprocity mandatory; the court “shall not” recognize or enforce the judgment without reciprocal treatment.<sup>225</sup> Like the other bases mentioned above, the party resisting enforcement of the foreign judgment bears the burden to establish a lack of reciprocity and must raise at least “substantial doubt” about a reciprocal treatment.<sup>226</sup> The party may do so via “expert testimony, or by judicial notice if the law of the state of origin or decisions of its courts are clear.”<sup>227</sup> By placing the burden of proof on the party resisting enforcement and requiring that party to raise “substantial doubt” as to reciprocity, the proposed FJREA minimizes the risk that an American court will too easily refuse to recognize and enforce a foreign judgment. This minimizes the risk of an ensuing vicious circle in which each court system refuses to recognize the other’s judgments because of a lack of reciprocal treatment in fact.

Even without the Hague Judgments Convention, the FJREA is valuable to litigants desiring to enforce U.S. money judgments in foreign courts that have reciprocity requirements and yet are generally receptive to American judgments. Litigants will find it easier to demonstrate reciprocity because they can cite a uniform federal statute rather than the patchwork quilt of state laws, which leads to confusion.<sup>228</sup> Indeed, as the reporters for the ALI project have noted, “it is virtually impossible to explain to French or Dutch or Japanese lawyers that a judgment originating in their country may be enforceable in New York but not in New Jersey, in Oklahoma but not in Arkansas.”<sup>229</sup>

- D. Greater parity in personal jurisdiction and judgment enforcement will improve the American delegation’s bargaining position and benefit U.S. consumers.

Increased parity in the doctrine of personal jurisdiction will create an incentive for our Hague Convention negotiating partners to return to the negotiating table and hopefully make progress on the Hague Judgments Convention. Our negotiating partners will have an incentive to continue

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225. *Id.*

226. *Id.* § 7(b).

227. *Id.*

228. See Brand, *Enforcement of Foreign Judgments*, *supra* note 14, at 256. (“When proof of reciprocity is necessary in an overseas enforcement action, a litigant will want a judgment rendered in a United States jurisdiction that has a clear rule of its own on recognition and enforcement of foreign judgments.”).

229. Silberman & Lowenfeld, *supra* note 136, at 636; see also RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, *supra* note 212, at 1 (“[I]t would strike anyone as strange to learn that the judgment of an English or German or Japanese court might be recognized and enforced in Texas but not in Arkansas, in Pennsylvania but not in New Jersey.”).

negotiations on the Convention because it will establish a more uniform, predictable test for personal jurisdiction that is comparable to the Brussels Convention paradigm. This simple, familiar test certainly seems preferable to a statute requiring consent to jurisdiction. And our European counterparts will still be able to use the Convention as an opportunity to foreclose exorbitant bases of personal jurisdiction, such as “tag” jurisdiction, against their constituents.

Interestingly, although the *Nicastro* case further cemented the personal jurisdiction asymmetry, the Court’s recent general jurisdiction cases are new arrows in the American delegation’s quiver when we resume negotiations with our European partners. The Court’s recent opinions in *Goodyear* and *Daimler* should remove some of our negotiating partners’ anxiety regarding excessive assertions of general jurisdiction. In *Goodyear*, the Court stated that general personal jurisdiction requires a very substantial connection to the forum: “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them *essentially at home in the forum State*.”<sup>230</sup> In *Daimler*, the Court further clarified the “essentially at home” test, stating “the place of incorporation and principal place of business are paradig[m] . . . bases for general jurisdiction.”<sup>231</sup> The “essentially at home” standard should help resolve European fears that American courts will exercise general jurisdiction over foreign corporations based on thin contacts.

Perhaps even more important than parity in personal jurisdiction, the proposed FJREA creates an incentive to return to the Hague negotiations. In fact, the FJREA accomplishes two important tasks. First, foreign countries will now have a greater incentive to enforce U.S. money judgments. Because foreign judgments are generally more enforceable in the United States than U.S. judgments are abroad, foreign countries that already enjoy liberal judgment enforcement in the U.S. have a diluted incentive to recognize and enforce U.S. money judgments. Why would any country subject its citizens to the loss of wealth and property that results from enforcing a U.S. money judgment when the foreign country’s citizens already enjoy the ability to enforce their judgments in the United States? If a foreign country loses the advantage of this asymmetry, it will want to

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230. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (emphasis added).

231. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (internal quotations omitted).

regain the ability for its citizens to enforce their judgments in the United States. Accordingly, foreign countries will have a greater incentive to give up protectionist treatment disfavoring American money judgments by either unilaterally enforcing American judgments, or returning to the negotiating table in the hopes of consummating the Hague Judgments Convention.

The proposed FJREA also preserves and enhances the enforceability of judgments in countries with which we already enjoy a liberal enforcement practice, despite reciprocity. It is much simpler for a U.S. litigant to point to a single, uniform federal statute, and the comments and eventual case law interpreting it, in order to establish that the United States liberally enforces foreign judgments. Both results are good for American business and consumers.

## V. CONCLUSION

American law governing personal jurisdiction over foreign nationals and foreign judgment enforcement currently works to the disadvantage of Americans. This need not be so. The abandoned Hague Judgments Convention has the potential to level the playing field for American businesses and consumers alike. And to encourage the parties to resume negotiations and bring about a compromise solution that will benefit all parties to the treaty, Congress can and should pass legislation that will simultaneously encourage the parties to return to the negotiating table while ameliorating the harsh effects of existing U.S. law. Make no mistake, many obstacles remain to both successful negotiations abroad and domestic legislation like the FMLAA and FJREA. But the payoff is worth it.